$737-50 was appropriated towards payment of their account and $300/– was handed back as cash. This sum of $300 entered in the ledger account of the estate as a cash payment was handed to the appellant. At the May Assizes holden at Malacca before Mr. Justice W. K. Horne sitting with a jury, the appellant was charged with having committed falsification of accounts under section 477a of the Penal Code and criminal breach of trust as a servant under section 408 of the Penal Code. At the trial the prosecution sought to adduce evidence of system. Counsel for the defence objected to the admission of this evidence and his objection was over-ruled. The appellant was found guilty on both charges and sentenced on the first charge to 6 months rigorous imprisonment and a fine $1,000 or 12 months in default and on the second charge to 6 months rigorous imprisonment, the sentences to run concurrently. The accused appealed and the appeal was heard before the Court of Criminal Appeal. The Court dismissed the appeal in an oral judgment which was delivered by Terrell, Ag. C.J.

Braga for the appellant.

Storr, Crown Counsel, for the respondent.

TERRELL, AG. C.J.—In this case the Court is agreed that the Appeal be dismissed.

Among the various points raised so ably by Mr. Braga in this Appeal, there is the very difficult question as to the cases in which evidence of system can be admitted.

In the present case the Court finds that such evidence of previous transactions can be admitted under Sections 14 and 15 of the Evidence Ordinance—the illustrations to Section 14 make that quite clear.

It is not only to rebut the defence of accident that such evidence can be admitted; it can also in a proper case be called to prove a state of mind, to prove criminal intention.

In the case before the Court this evidence was particularly relevant because the accused did not deny that he had made the false entries, he did not deny that he had the money. He said that he made the false entries under the direction of Mr. Vowler and that Mr. Vowler had had the money. So surely it must be relevant to look to previous transactions to see what the previous method of business had been, so as to arrive at a conclusion whether or not that defence would hold water. Is it likely that Mr. Vowler would have asked the accused to falsify various items in the account to the extent of one or two dollars? Still more is it likely that the accused would have continued to falsify the accounts on Mr. Vowler's instructions when Mr. Vowler was not in the country? That is what the accused alleged.

It appears that that was substantially the defence and in order to rebut it this other evidence was absolutely relevant.

There is nothing so far as I can see inconsistent with what I said in the judgment which has been cited in the Malayan Law Journal (*Teo Koon Seng* vs. *Rex*, 5 M.L.J., p.10). It is quite a different case and evidence of an entirely separate transaction had been brought in to prove guilty intention. There was no connection between the two sets of circumstances in that case. The whole issue was whether the accused had attempted to extort money or not. If the Court was satisfied that he had extorted money, no explanation was possible, and it was not permissible to prove that the accused extorted money from A because on an entirely different occasion he had extorted money from B. In this case on the other hand the questions whether the money had been taken and the accounts falsified were not in dispute. The only matter in dispute which the Crown had to satisfy the Jury was the knowledge or intention with which the acts had been done. The Crown were not trying to prove that the accused had committed the particular offences charged, by proving that he had committed similar offences on other occasions. They were anticipating the defence that he was only an abettor, and that the criminal intention which was the essence of the charges alleged, was absent.

As regards sentence, in the opinion of the Court the two sentences of six months rigorous imprisonment are very mild. It is possible that another Court might have thought it better to give twelve months or eighteen months on each charge and make these sentences run concurrently. As it is the total sentence apart from the fine is only twelve months and the Court considers that such sentence should not be interfered with.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

TERRELL, Ag. C.J., THOMAS, C.J. (F.M.S.) and HOWES, J.

June 18, 1937.

TEH PENG KIM v. REX

[SINGAPORE CRIMINAL APPEAL No. 1 of 1937]

Criminal law—destruction of valuable security—"fraudulently" or "dishonestly"—charge—duplicity—judge's summing-up—misdirection—Penal Code, S. 477; Criminal Procedure Code, S. 215 (2).

The two words "fraudulently" and "dishonestly" in section 477 of the Penal Code are to be treated as different aspects of the criminal intention essential to the offence of destroying a valuable security; hence a charge alleging fraud and dishonesty in the alternative is not bad for duplicity. It is desirable, however, that the charge under this section should be so framed as to allege either fraud or dishonesty, thereby avoiding the slightest

suggestion that the accused is not certain of which specific act with which he is charged.

Under Section 215(2) of the Criminal Procedure Code a Judge may, if he thinks proper in the course of his summing-up, express his opinion on questions of fact. It is, nevertheless, his duty to warn the Jury that the decision on the facts rests entirely with them and not with him. Where a Judge fails to give such a warning, the omission to do so amounts to a misdirection.

CRIMINAL APPEAL.

The facts and grounds of appeal sufficiently appear from the judgment below.

Gale for the Appellant.

Storr, Crown Counsel, for the Crown.

Cur. Ad. Vult.

The Judgment of the Court of Criminal Appeal was delivered by—

TERRELL, AG. C.J.—The accused was charged as follows:

On or about 2nd December, 1936, at No. 10 Church Street, Singapore, did fraudulently or dishonestly destroy a document, to wit an I.O.U. chit for $200 which is or purports to be a valuable security, and thereby committed an offence punishable under section 477 of the Penal Code, and was convicted after a trial before Horne J. and a common jury of the attempt and sentenced to nine months rigorous imprisonment.

He was given leave to appeal by the Court of Criminal Appeal under section 5 (b) of the Court of Criminal Appeal Ordinance, and the appeal was heard on the 18th June, when after argument the appeal was allowed and the conviction quashed.

The grounds of appeal may be summarised as follows:—

1. That the charge was bad in law in that it was expressed in the alternative as alleging that the criminal act was done "fraudulently" or "dishonestly."

2. That there was misdirection.

As regards the allegation of 'duplicity,' the leading authority on the subject is the case of *Charles Wilmot*, 24 Cr. App. R. p. 63, and in the course of his judgment the Lord Chief Justice quotes with approval the following dictum of Avory J. in *Surrey Justices; Exp. Witherick*. (1932) 1 K.B. p. 450 at p. 452:

> "It is an elementary principle that an information must not charge offences in the alternative since the defendant cannot then know with precision with what he is charged and of what he is convicted, and may be prevented on a future occasion from pleading '*autrefois convict.*'"

The test therefore appears to be whether there are in substance separate charges. Now section 477 of the Penal Code, under which the accused was charged and convicted, commences "Whoever fraudulently or dishonestly, or with intent to cause damage etc." There is no comma between "fraudulently" and "dishonestly," and it is permissible to draw the conclusion that the two words are treated merely as different aspects of the *mens rea* which is essential to constitute the offence. In fact "fraudulently" is nowhere specifically defined in the Code (see section 25), and it seems to have been the intention of the Code that the prosecution should be permitted to prove the guilty intention by proving that the act was done either fraudulently or dishonestly without specifying which. For the purpose of the section the two expressions appear to be treated as different aspects of the same thing, and it is hardly possible to visualise a case of a person, convicted or acquitted of having destroyed a valuable security "dishonestly", being subsequently tried and convicted of having done the same act "fraudulently." At the same time the Court considers it desirable that the charge should be drawn so as to allege either fraud or dishonesty, and so avoid the slightest suggestion that the accused is not certain of the specific act with which he is charged. The first ground of appeal therefore fails.

As regards misdirection the Court accepts the principle that a judge's summing up should not be examined through a microscope, and the effect of the summing up as a whole should be considered; and it is not necessary to consider many of the criticisms which were directed against it.

There are however certain passages to which objection can be taken. In particular the learned judge stated—

> "There is no doubt at the time there was some sort of struggle."

and later:

> "I do not come to the conclusion that these three women have colluded together."

Both these were controversial facts, the decision of which rested entirely with the jury, and although under section 215 (2) of the Criminal Procedure Code the Judge may, if he thinks proper in the course of his summing up, express to the jury his opinion on questions of fact, it is a salutary rule that he should warn the jury that the decision of the fact rests with them and not with him. The Court cannot find that the learned judge gave any such warning either generally, or with regard to these particular statements.

Then again on page 39 of the Record the learned judge is directing the jury as to the dishonest intention which the jury must find before they can convict, and he deals with the loans made by the complainant and two other women, loans which the accused had failed to repay. The summing up then proceeds:—

"You must take these facts and consider them. I do not say that you are bound to find that he was dishonest, but there is evidence from which you could so find. What is a man who is a contractor doing, going round and borrowing $100 from this woman and $200 from another woman and again from another whom he names Mrs. Keh Wah? He is a man of business. He does not say they are professional money lenders."

Taking the passage as a whole the learned judge tells the jury that in his opinion the borrowing of money from these Chinese women in the first place was dishonest, and from that the jury are invited to conclude that the tearing up of the I.O.U. was dishonest. Again the jury are not warned that the original borrowing may not have been dishonest at all, and if so the original dishonesty was quite irrelevant to the proof of *mens rea* in the tearing up of the document.

Again in his address to the jury the accused, who appeared in person at the trial, emphasized the improbabilities of the prosecution case. In particular he says:—

"I would not be so idiotic as to tear up that document and throw it on the floor so that they would be able to get hold of it again, and so have proof to bring a case against me. If I had the intention to destroy it, I would have torn it up and thrown certain portions away."

The substance of this argument was never put to the jury in the summing up, and in fact the whole defence is dismissed in a couple of sentences.

In considering these various matters the Court do not consider that they should dismiss the appeal on the ground that notwithstanding these objections there has in fact been no miscarriage of justice. It may well be that the jury accepted the view of the facts put forward by the learned judge without considering that the decision rested with them, and not with him. In the same way they may have thought that a dishonest intention could be inferred for reasons irrelevant to the consideration of the actual facts before them, and in the result may have found a verdict which otherwise they might not have found.

In the opinion of the Court therefore the appeal should be allowed, the conviction quashed and the sentence set aside.

Appeal allowed.
Conviction quashed.

[ORIGINAL CIVIL JURISDICTION]
GORDON-SMITH, J.
July 9, 1937.

IN THE MATTER OF THE ESTATE OF CHOONG CHENG KEAN DECEASED. CHOONG ENG POH AND CHOONG ENG KHIN (INFANTS) BY THEIR NEXT FRIEND TAN CHOO LIANG (WIDOW).

vs.

LIM GAIK KEE NEOH, CHOONG LYE HOCK AND CHOONG LYE HIN.

[PENANG ORIGINATING SUMMONS No. 4 of 1937]

Will — construction — legacy contingent on legatee surviving date of distribution—death of legatee—gift over—division of legacy amongst legatee's widow and issue—payment to issue on attaining twenty-one—vesting.

A Chinese testator after making divers bequests and providing for the management of his family house and businesses and for monthly allowances to certain beneficiaries, gave the residue to his trustees upon trust to distribute this residue at the expiration of twenty years from his death, as to a sum of $100,000/– thereof to one of his sons C. L. T., contingently on his surviving the date of distribution and as to the balance to his two other sons; if C. L. T. should die before the date of distribution, the legacy as to one-fifth to go to his widow and as to the remaining four-fifths to any one of his issue, such share of the legacy to become payable on their attaining majority. The testator also directed the trustees "in the meantime" to pay a monthly allowance of $200/– to C. L. T.'s widow for the maintenance of herself and her children. C. L. T. died before the date of distribution, leaving a widow and two infant sons. In 1936 his widow received her share of the legacy.

Held, on the proper construction of the Will, that the portion of the legacy given to C. L. T.'s two sons vested in them at the expiration of twenty years from the testator's death but that it is subject to divestment, if the issue does not attain twenty-one years, on which event it will become payable, if both sons survive that event, to them in equal shares; if only one survives, the whole goes to the survivor.

Held further, that "in the meantime" refers to the period of twenty years from the testator's death and that the sons of C. L. T. were entitled to interest on their share of the legacy from the date of vesting of such share, but not to both interest and maintenance.

ORIGINATING SUMMONS.

Hogan for the Plaintiffs.

Ross (*Lee Hong Teik* with him) for the defendants.

The questions propounded for determination by the Court sufficiently appear from the judgment below.

Cur. Ad. Vult.

GORDON-SMITH, J.—The main question arising on this Originating Summons is contained in Prayer 3, as follows:—That it may be determined whether upon the true construction of the Testator's said will and codicil, the balance trust legacy of $76,000/- has already vested in the said Plaintiffs in the events which have happened, or whether the same will only vest in the said Plaintiffs upon their respectively attaining the age of 21 years.